K.L. HILTON

v.

GOVERNMENT OF MALAYSIA

HIGH COURT MALAYA, KUALA LUMPUR
WAN HAMZAH J
[CIVIL APPEAL NO. 30 OF 1983]
24 JANUARY 1984

REVENUE LAW: *Income tax due from employee - Whether employer liable to pay - Cessation of work by employee - Failure of employer to give notice - Income Tax Act 1967 ss. 83(3) & 107(4).*

The defendant (appellant) had employed one Wolfgang Schindler, who ceased employment on 7 December 1975. Income tax was due from Schindler. The plaintiff (respondent) brought an action in the Sessions Court to recover the amount due from the defendant, contending that by reason of the failure of the defendant to give written notice to the Director General of Inland Revenue that it was about to cease to employ Schindler, as required by s. 83(3) of the Income Tax Act ("the Act") the defendant became liable under s. 107(4) to pay the income tax due from Schindler. Summary judgment was given for the plaintiff. The defendant appealed.

Held:

[1] The defendant's contention that s. 83(3) and s. 107(4) did not apply must fail.

(a) Section 83(3) applies not only to a case where the employer terminates the employment of an employee but also to a case such as the present one, where an employee resigns on his own.

(b) Further, if for any good reason the employer is not able to give notice of not less than one month before the cessation of employment, he is nevertheless required to give notice though less then one month from the cessation.

[2] However, the summary judgment must be set aside.

(a) Certain issues regarding the notice had to be determined by the President of the Sessions Court.

(b) Further, there was no allegation in the statement of claim that Schlinder's tax could not be recovered from him by reason of the defendant's failure to comply with s. 83(3) of the Act. In an action brought under s. 107(4) such as the present, it must be pleaded and shown that the tax cannot be recovered from the employee by reason of the failure of the employer to comply with s. 83(3).

[Appeal allowed.]

Legislation referred to:
Income Tax Act 1967, ss. 83(3), 107(4)

For the appellant/defendant - Kanesalingam; M/s. Kanesalingam & Co.
For the respondent/plaintiff - Suryadi bin Halim Omar; Attorney General's Chambers

JUDGMENT

Wan Hamzah J:

The defendant in the Kuala Lumpur Sessions Court Civil Action No. 940/1981 (appellant in this appeal) employed one Wolfgang Schindler (hereafter referred to as Schindler). Income tax amounting to RM12,101.85 was due from and payable by Schindler. He ceased employment with the defendant on 7 December 1975. The plaintiff (respondent in this appeal) alleged that the defendant had failed to give a written notice to the Director General of Inland Revenue that it was about to cease to employ Schindler, as required by s. 83(3) of the Income Tax Act. The plaintiff contended that by reason of the failure of the defendant to comply with s. 83(3), under s. 107(4) the defendant became liable to pay the income tax of RM12,101.85 due from Schindler. Therefore the plaintiff brought the action in the Sessions Court to recover the said sum from the defendant. The pleaded case of the defendant was that Schindler resigned on his own accord on 7 December 1975 after having given notice of resignation as late as on 28 November 1975. It was contended by the defendant as follows:

> Section 83(3) of the Income Tax Act requiring 30 days prior notice to be given to the Director General by the employer applies only when the employer ceases to employ an individual and does not apply when an individual resigns without giving more than 30 days notice and the defendant will say that in this instance the defendant had no knowledge at all prior to 28 November 1975 that the said Wolfgang Schindler was leaving their employ on 7 December 1975.

It was further contended by the defendant that s. 107(4) does not apply in this case as it was not the employer who was about to cease to employ under s. 83(3). The plaintiff applied to the Sessions Court for liberty to sign final judgment and the Sessions Court gave summary judgment for the plaintiff. Hence this appeal by the defendant.

Section 83(3) reads as follows:

> Where an employer is about to cease to employ an individual who is or is likely to be chargeable to tax in respect of income in respect of gains or profits from the employment, the employer shall not less than one month before the cessation give written notice thereof to the Director General stating the full name and address of the individual and the expected date of cessation:
>
> Provided that, where he is satisfied that it is reasonable to do so in the circumstances, the director General may accept for the purposes of this subsection a notice given less than one month before the cessation or a notice given on or after the cessation.

In my judgment s. 83(3) applies to a case where an employee resigns on his own as well as to a case in which the employer decides to terminate the employment of an employee. When an employee properly tenders resignation from employment the employer will thereby cease to employ him, and therefore under s. 83(3) the employer is required to give the notice to the Director General. Subsection (3) of s. 83 should be read together with the Proviso which immediately follows the subsection, and in my judgment the subsection when so read means that if for any good reason it is not possible for the employer to give the notice not less than one month before the cessation of employment e.g. because the employee gives less than one month notice of resignation, the employer is all the same required to give the notice though less than one month from the cessation.

At the hearing of this appeal it was submitted by Counsel for the defendant that the learned President should not have given judgment for the plaintiff because there was evidence before him showing that notice was given before the cessation. Counsel for the defendant referred to Exhibit MA1 attached to the affidavit of the Inland Revenue Department Examiner dated 6 November 1981. Exhibit MA1 was a letter from the Inland Revenue Department to the defendant in which there is a reference to the defendant's notification of the cessation of Schindler's employment. It was submitted that since Exhibit MA1 was dated 10 December 1975 the notification must have been made not later than 7 December 1975 and that the President of the Sessions Court should have drawn such inference from Exhibit MA1. The Senior Federal Counsel for the plaintiff referred to Exhibit MA2 attached to the same affidavit, which was a letter written by Schindler in which he stated that before he resigned on 7 December 1975 the defendant had held back two months salary. The Senior Federal Counsel also referred to Exhibit MA3 attached to the same affidavit in which Schindler stated that his salary had been kept back for several months for the purposes of settling his dues to the Inland Revenue Department and it was submitted by the Senior Federal Counsel that the inference to be drawn from the facts stated in these two letters is that for some months the defendant had known of Schindler's intended resignation and for that reason had taken steps to hold back his salary in order to settle his income tax. It was therefore submitted that under s. 83(3) the defendant had to give the notice to the Director General not less than one month before the cessation. Unfortunately in his grounds of decision the President of the Sessions Court did not state whether he took into consideration Exhibits MA1, MA2 and MA3, or what inference he drew from them. I find that these are the following issues which should be determined by the President of the Sessions Court:-

(a) What was the date on which the defendant first came to know of Schindler's intended resignation.

(b) Depending on the answer to question (a), whether the defendant was required to give notice of not less than one month before the cessation or notice of less than one month.

(c) What was the date on which the defendant gave the notice.

(d) Depending on the answers to questions (b) and (c), whether the defendant had failed to comply with s. 83(3).

The above issues have to be tried, and I therefore order that the summary judgment be set aside and that this case be sent back to the Sessions Court for trial of the issues.

There is another reason why the summary judgment should be set aside. Section 107(4) provides:

> An employer who fails to comply with s. 83(2), (3), (4) or (5) or this section with respect to an employee of his shall be liable, in the case of a failure to comply with s. 83(2), (3), (4) or (5) to pay the full amount of tax which by reason of his failure cannot be recovered from the employee ...

The liability of the employer arises if:

(i) the employer fails to comply with s. 83(3), and

(ii) by reason of that the tax cannot be recovered from the employee.

In an action brought against an employer to recover tax of his employee where the employer has failed to comply with s. 83(3) in respect of that employee, it must be pleaded and shown that the tax cannot be recovered from the employee by reason of that failure. In the present case there is no allegation in the statement of claim that Schindler's tax cannot be recovered from him by reason of the defendant's failure to comply with s. 83(3).

The appeal is allowed. Cost to the defendant (appellant) in any event.

Also found at [1984] 1 CLJ 249